

No. 11288.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.*,

Appellees.

REPLY BRIEF OF APPELLEES, OTTO DAVIS AND MELVIN MYERS.

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PAUL P. O'BRIEN,

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This case was decided by the trial court against Radich & Brown as owners of the bulldozer involved in the accident and which equipment was leased out fully maintained and operated by an operator of their choice and, consequently, in rendering such decision the trial court properly and necessarily rendered judgment in favor of defendants, Otto Davis and Melvin Myers, as in no way responsible for the damages sued upon by the United States Government.

Now the defendants, Radich & Brown, against whom such judgment was entered, are prosecuting this appeal on the theory that the responsibility should lie with the contractor, to-wit, Walter S. Roeder, whose work was being performed by the bulldozer at the time the accident occurred. If this Court should see fit to reverse the de-

cision of the trial court and hold that liability rests with the contractor whose work was being performed by the bulldozer at the time of the accident, then these defendants, Otto Davis and Melvin Myers, are still outside the scope of any judgment which should properly be entered on such theory of the case for the reason that these defendants were not in charge of any activities of said bulldozer by the contractor, Walter S. Roeder, or anyone else at the time of the accident herein sued on and, in fact, did not authorize or even know that the bulldozer was being used on the job of Walter S. Roeder at the time of the accident or at any other time involved in this case. All the evidence introduced at the trial relative to the position of Otto Davis and Melvin Myers would seem to indicate that they were actually only the agents of Galen B. Finch in so far as their dealings with the bulldozer in question was concerned, which testimony showed that the payment for the use of the bulldozer on jobs procured by Otto Davis and Melvin Myers were more often than not made directly to Galen B. Finch, and that the few instances when such payments were made to Otto Davis and Melvin Myers they were accounted for to Galen B. Finch.

Then we have the specified and uncontradicted testimony of both Otto Davis and Henry F. Goodine, the superintendent for Jack Wilcox, to the effect that the authorization to use the bulldozer as given by Otto Davis was as to the Jack Wilcox job only and no authorization was ever given by either Otto Davis or Melvin Myers that said equipment should be used by or on behalf of Walter S. Roeder. In this regard I call attention to the testimony of Otto Davis as set forth on pages 248

and 249 of the transcript of record on this appeal, which is as follows, to-wit:

“Q. By Mr. Bedford: Was there anything in your conversation with Hank, I believe is his name, the man that you let have the tractor for Wilcox, was there anything in your conversation regarding the time you could spare the tractor or how long the job was to be? A. He told me that he figured it would take three or four days and that is what I went and told the farmer.

Q. And was there anything said about what it was to be used for on that job? A. Yes, sir. He told me that he wanted to do some excavation work, clearing and leveling for the foundation for a new hangar that was being built on the Palm Springs airport.

Q. Well, was it let for the specific job only? A. That is all I knew about. That is all I let it for because I was supposed to get the tractor back in three or four days and clear this man's date grove so he could get the water back on it.

Mr. Bedford: That is all.”

and also to the testimony of Henry F. Goodine as set forth on page 207 of the transcript of record on this appeal, which is as follows, to-wit:

“Q. By Mr. Bedford: As a matter of fact, he let you have it for that one job, did he not? A. That is correct.

Q. And to refresh your memory further, isn't it true that you met him the next morning bringing the equipment down to your job? A. That is correct.

Q. And that is the job where the leveling of the spot for the hangar that Wilcox had? A. That is right."

Consequently these defendants, Otto Davis and Melvin Myers, are neither the owners of the equipment which was leased fully maintained and operated by appellants, Radich & Brown, nor were they in control of nor did they authorize the use of said equipment on the work of Walter S. Roeder, where the accident herein involved occurred.

Wherefore, these defendants, Otto Davis and Melvin Myers, respectfully submit that they cannot be held liable for the damages sued on either under the theory of the case as taken by the trial court nor by the theory of the case as urged by appellants herein.

Respectfully submitted,

STEPHEN BEDFORD,

Attorney for Appellees, Otto Davis and Melvin Myers.